Tanya M. Schierling [SBN 206984]
tschierling@swsslaw.com
Michael M. Vasseghi [SBN 210737]
mvasseghi@swsslaw.com
SOLOMON WARD SEIDENWURM & SMITH, LLP
401 B Street, Suite 1200
San Diego, California 92101
Telephone: (619) 231-0303
Facsimile: (619) 231-4755

Attorneys for Defendant TAYLOR'S' INDUSTRIAL SERVICES. LLC a/k/a HPM DIVISION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

WELLTEC MACHINERY USA, INC., a California corporation as assignee of WELLTEC MACHINERY LIMITED a Hong Kong registered Company,

Plaintiff,

v.

TAYLOR'S INDUSTRIAL SERVICES, LLC a/k/a HPM DIVISION, and DOES 1 THROUGH 100,

Defendants.

CASE NO. 08 CV 0877 BEN LSP

DEFENDANT TAYLOR'S INDUSTRIAL SERVICES, LLC's MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS; OR IN THE ALTERNATIVE, TRANSFER VENUE OR STAY PROCEEDINGS PENDING ARBITRATION

Date: June 30, 2008
Time: 10:30 a.m.
Dept: Courtroom 3
Honorable Roger T. Benitez

Complaint Filed: January 28, 2008

I
INTRODUCTION AND SUMMARY OF ARGUMENT

Defendant Taylor's Industrial Services, LLC ("Taylor's") is a non-California company with insufficient contacts in California for this Court to exercise personal jurisdiction over it. Plaintiffs—the Hong Kong company Welltec Machinery Limited ("Welltec Hong Kong") and its United States assignee, Welltec Machinery USA, Inc ("Welltec U.S.A.")—do not allege ***any*** forum related activities by Taylor's and their Complaint provides no basis for why the case was filed in this district.[1] Accordingly, the Court should dismiss Plaintiffs' claims against Taylor's for lack of personal jurisdiction (Fed. R. Civ. Proc. 12(b)(2)), and improper venue (Fed. R. Civ. Proc. 12(b)(3)). Additionally, each of the alleged claims in the Complaint arises from an agreement wherein parties agreed in writing to arbitrate all disputes arising out of that agreement. Plaintiffs' contractual obligation is clear and explicit:

> Any dispute or claim arising out of this agreement shall be referred to and finally resolved by the International Chamber of Commerce in accordance with its Conciliation and Arbitration Rules. The venue of such arbitration shall be in Hong Kong.

(*See* "Sole Distributorship Agreement" ¶ 20 attached as Exhibit 1 to Declaration of Chris Filos filed concurrently in support this motion.)

If the Court chooses not to dismiss this case, it should transfer the case to the Southern District of Ohio, where defendant resides – the proper venue in this case. Finally, if the Court elects to neither dismiss nor transfer the case, it should stay the matter, allowing the parties to arbitrate.

II
SUMMARY OF RELEVANT FACTS

A. Plaintiffs' Allegations Against Taylor's.

On January, 28, 2008 Plaintiffs filed this action against Taylor's alleging various contract and fraud causes of action arising out of a Sole Distributorship Agreement

[1] Plaintiffs initially filed the Complaint in San Diego Superior Court. Taylor's filed a notice removing the action to this Court on May 16, 2008.

("Agreement") signed by Taylor's and Welltec Hong Kong. According to the Complaint, Welltec Hong Kong subsequently assigned its rights and interests in the Agreement to Welltec U.S.A. Complaint ¶ 1. (Unless noted otherwise, this motion will refer to Welltec Hong Kong and Welltec U.S.A. collectively as "Welltec" or "Plaintiffs.") The parties contracted for Taylor's to be Welltec's exclusive distributor of its mold injection machines. Taylor's exclusive territory for the sale of these machines was limited to Canada. *See* Agreement ¶ 1; Complaint ¶ 9.

B. Taylor's' Lack of Minimum Contacts With California.

Taylor's does as much business in California as it does in Kazakhstan – none. Taylor's is organized under the laws of Illinois with its principal place of business and headquarters in Mt. Gilead, Ohio. Declaration of Chris Filos ("Filos Decl."), ¶ 2. Taylor's has never conducted business in California and is not qualified, or required to be qualified, to do business in California. Filos Decl., ¶ 3. Taylor's does not and never has owned or operated any retail stores in California; has not maintained bank accounts, offices, or employees in the State of California; and has not advertised in the state. Filos Decl., ¶ 4. Nor does Taylor's have any customers in this state. *Id.* Taylor's does not own, use, or possesses any real property in California and has not designated an agent for service of process in California. *Id.* Finally, Taylor's does not hold any type of license issued in California. *Id.*

The Agreement forming the basis of Plaintiffs' complaint was negotiated and executed by Taylor's president, Chris Filos in Ohio. Filos Decl., ¶ 6. At the time of signing, Mr. Filos was informed that Welltec Hong Kong executed the Agreement in Hong Kong. *Id.* Taylor's performed all of its obligations under the Agreement outside of California. *Id.*

The machines that Taylor's purchased from Welltec pursuant to the Agreement were either delivered F.O.B. to Ohio, or Taylor's arranged to have the machines picked up from Welltec's facility in Hong Kong. Filos Decl., ¶ 7. Taylor's has never taken delivery of any machine, or any other goods or products pursuant to the Agreement, in California. *Id.*

The Complaint alleges that two shipments of goods were "delivered" in Long Beach, California. Complaint ¶¶ 17, 19. To be clear—these shipments were not ***delivered to Taylor's*** in California. Rather, the shipments arrived and passed through the port of entry at Long Beach, California, en-route to their delivery destination in Ohio. The Long Beach port of entry was not selected by Taylor's. *Id*. All of the machines that Taylor's has purchased from Welltec have been sold exclusively to customers in Canada, not California, as contemplated by the terms of the Agreement. *Id*.

Taylor's has not consented, and does not consent, to the exercise of jurisdiction over it in California.

C. Parties' Contractual Obligation to Arbitrate.

The Complaint alleges various contract and fraud causes of action, all arising out of the written Agreement between Welltec and Taylor's. The Agreement contains the following arbitration provision:

> **Any dispute** or claim arising out of this agreement shall be referred to and finally resolved by the International Chamber of Commerce in accordance with its Conciliation and Arbitration Rules. The venue of such arbitration shall be in Hong Kong.

The Agreement further provides that:

> No amendment or variation of this agreement shall be effective to bind the parties hereto unless such amendment or variation shall have been put in writing and duly signed on behalf of both parties hereto.

Plaintiffs have apparently chosen selective enforcement of the Agreement, by initiating this action in court on contravention of the arbitration provision.

III
DUE PROCESS PRECLUDES THIS COURT FROM EXERCISING PERSONAL JURISDICTION OVER TAYLOR'S

A. Personal Jurisdiction Is A Matter of Constitutional Due Process.

Before the Court can exercise personal jurisdiction, two requirements must be met: (1) the forum state's long arm statute must authorize personal jurisdiction over the defendant, and (2) exercise of that jurisdiction must comport with constitutional principles

of due process. *Omeluk v. Langsten Slip & Batbyggeri A/S* 52 F.3d 267, 269 (9th Cir. 1995) (*Omeluk*).

California's long-arm statute authorizes "jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." Cal. Code Civ. Proc. § 410.10. Thus, the issue before this Court is whether the exercise of personal jurisdiction over Taylor's comports with the Due Process Clause of the United States Constitution. *Omeluk*, 52 F.3d at 269 (where state long-arm statute reaches as far as the Due Process Clause, the Court must analyze whether the exercise of jurisdiction would comply with due process).

In the case of a nonresident defendant, like Taylor's here, the "general rule" is that the Court may extend jurisdiction only where the defendant's "minimum contacts" in the forum state (California) are sufficient such that maintenance of the action does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington* 326 U.S. 310, 316 (1945) (*International Shoe*).

B. Plaintiffs Bear The Burden Of Proof.

Although Taylor's is the moving party, *Plaintiffs* bears the burden of proof. *VCS Samoa Parking Co. v. Blue Continent Prods. (PTY) Ltd.* 83 F.Supp.2d 1151 (S.D.Cal. 1998), aff'd 202 F.3d 280 (9th Cir. 1999) (the party asserting jurisdiction carries the burden of proof once the issue is raised).

Plaintiffs' unverified Complaint does not adequately plead minimum contacts by Taylor's in California. The Complaint reveals that the reason Plaintiffs have chosen to bring the action in this district is Plaintiffs' own convenience: Welltec U.S.A., the purported assignee of the Agreement, is "a California Corporation with offices in San Diego, California" and "actively engaged in the business of manufacturing and selling heavy plastic injection molding machinery for sale to U.S. and California based customers." Complaint ¶ 1. Yet Plaintiffs' Complaint sets forth absolutely no facts to show that Taylor's dealt with anyone other than Welltec Hong Kong, as the Agreement itself establishes.

/ / /

/ / /

C. Taylor's Does Not Have Minimum Contacts In California Sufficient To Exercise Personal Jurisdiction Over It In This Case.

"There are two types of personal jurisdiction: general and specific." *Ziegler v. Indian River County*, 64 F.3d 470, 473 (9th Cir. 1995) (*Ziegler*), citing *Reebok Int'l Ltd. v. McLaughlin*, 49 F.3d 1387, 1391 (9th Cir. 1995). Plaintiffs cannot meet its burden of proof on either basis.

1. The Facts Do Not Support General Jurisdiction Over Taylor's.

For general jurisdiction to result, the defendant's contacts in the forum state must be "'substantial" or "continuous and systematic.'" *Helicopteros Nacionales de Columbia v. Hall* 466 U.S. 408, 414-416, (1984) (*Helicopteros*); *Perkins v. Benguet Consol. Mining Co.* 342 U.S. 437, (1952) (*Perkins*); *Ziegler*, 64 F.3d at 473.

"The standard for establishing general jurisdiction is 'fairly high'" (*Bancroft & Masters, Inc. v. Augusta National, Inc.* 223 F.3d 1082, 1086 (9th Cir. 2000) (*Bancroft*)), and the United States Supreme Court has upheld general jurisdiction only once. *See Amoco Egypt Oil Co. v. Leonis Navigation Co., Inc.* 1 F.3d 848, 851, n.3 (9th Cir. 1993) (*Amoco*) (pointing out that the Supreme Court has upheld general jurisdiction only in the case of *Perkins v. Benguet Consol. Mining Co.*, *supra*). Indeed, the Ninth Circuit Court of Appeals acknowledges: "[w]e . . . regularly have declined to find general jurisdiction even where the contacts were quite extensive." *Amoco*, 1 F.3d at 851, n.3.

"Factors to be taken into consideration" when evaluating whether general jurisdiction lies are: whether Taylor's makes sales, solicits or engages in business in California, serves California's markets, designates an agent for service of process, holds a license, or is incorporated in California. *Bancroft*, 223 F.3d at 1086, citing *Hirsch v. Blue Cross, Blue Shield of Kansas City* 800 F.2d 1474, 1478 (9th Cir. 1986). The Court should also consider whether a company is registered to do business in California, maintains an office in California, has employees in California, maintains bank accounts in California, or markets or sells products in California. *Bancroft*, 223 F.3d at 1086; *Figi Graphics, Inc. v. Dollar General Corporation* 33 F. Supp. 2d 1263, 1265 (S.D.Cal. 1998) (*Figi*), citing *Helicopteros*,

466 U.S. at 415 and *Perkins*, 342 U.S. 437.

The answer to **every one** of these questions vis-a-vis Taylor's is "**no**." Taylor's is not incorporated or registered to do business in California; does not have offices, bank accounts, or employees in California; and does not advertise in California. Filos Decl., ¶¶ 3,4. In these circumstances, the *Figi* Court held that insufficient contacts existed to exercise general jurisdiction. *Figi*, 33 F.Supp.2d at 1265-1266 (defendant who was not incorporated in California, did not maintain an office in California, did not conduct any significant corporate activity in California, and did not make an effort to market or sell its products in California did not have "substantial" enough contacts for general jurisdiction).

The *Bancroft* case involved circumstances similar to those in *Figi* (defendant was not registered or licensed to do business in California, paid no taxes in California, and maintained no bank accounts in California) and the additional fact that defendants, like Taylor's here, did not target any print, television, or radio advertising toward California. *Bancroft*, 223 F.3d at 1086.

Simply because Taylor's has a website that is accessible by anyone in California is insufficient to confer jurisdiction over it. In *Bancroft*, although the defendant ***did*** maintain a website accessible by residents of California, because the website was passive – like Taylor's'[2] - and consumers could not use it to make purchases, insufficient contacts existed to create general jurisdiction. *Id*.

Because Plaintiffs cannot show substantial or continuous and systematic contacts in California by Taylor's, general personal jurisdiction cannot attach.

2. <u>The Facts Do Not Support Specific Jurisdiction Over Taylor's.</u>

Where the defendant does not have continuous and systematic contacts with the state sufficient to subject it to general jurisdiction, the Ninth Circuit applies a three-part test to determine whether specific jurisdiction exists, that is, whether the defendant nevertheless has "minimum contacts" with the forum sufficient for purposes of a cause of action related to

[2] Taylor's website is: http://www.taylorsind.com/2003/hpm/home/about/about.php

or arising out of those contacts. *Core-Vent Corp. v. Nobel Industries AB* 11 F.3d 1482, 1485 (9th Cir. 1993) (*Core-Vent*); *AT&T*, 94 F.3d at 588. Applying that test here, the Court may subject Taylor's to specific jurisdiction only if it finds:

(1) Taylor's has purposefully availed itself of the privilege of conducting activities in California, thereby invoking the benefits and protections of its laws;

(2) Plaintiffs' claims arise out of or result from Taylor's' California-related activities; and

(3) the assertion of jurisdiction would be reasonable, i.e., would comport with fair play and substantial justice.

Panavision Intern., L.P. v. Toeppen 141 F.3d 1316, 1320 (9th Cir. 1998). As the frequency of contacts and their relationship with the cause of action diminishes, the case for establishing jurisdiction over a defendant weakens. *International Shoe*, 326 U.S. at 317-319.

Additionally, where Plaintiffs, as they do here, assert multiple causes of action, the Court must have personal jurisdiction over the defendant with respect to each claim. *Data Disc., Inc. v. Sys. Technology Assoc., Inc.* 557 F.2d 1280, 1289, n.8 (9th Cir. 1977).

The facts do not establish purposeful availment by Taylor's in California, and Plaintiffs' claims do not arise out of any California-related activities, because Taylor's did not engage in any activities in California. All of the negotiations and communications to reach the Agreement, and performance conducted by Taylor's pursuant to the Agreement were conducted exclusively outside of California. Filos Decl., ¶ 6. As Plaintiffs readily admit, the machines at issue were intended for Canadian, not Californian customers. Complaint ¶ 9.

With respect to Plaintiffs' tort causes of action, the Court may find purposeful availment only if there is: "(1) an intentional action; (2) expressly aimed at the forum state; (3) causing harm, the brunt of which is suffered—and which the defendant knows is likely to be suffered—in the forum state." *Core-Vent*, 11 F.3d at 1485-6; *Figi*, 33 F.Supp.2d at 1267.

Here, Plaintiffs do not allege any specific activity by Taylor's in California, let alone one that was "intentionally" and "expressly aimed" at this state.

In *Bancroft*, *supra*, the court found purposeful availment for purposes of a tort claim under circumstances utterly absent here. There, defendant ANI directed a "cease and desist" letter to Bancroft & Masters, a business operating almost exclusively in California. In the letter, ANI asserted that B&M's internet domain name infringed on Plaintiffs' trademarks, and demanded that B&M turn over the domain name to Plaintiffs. *Bancroft*, 223 F.3d at 1084-1085. ANI's action directed at California triggered B&M to act in California; specifically, the letter triggered the dispute resolution provisions of the domain registrar, thereby compelling B&M to act which it did by filing a declaratory relief action in California. *Id*. at 1087. The court described ANI's action as "express aiming" and "individualized targeting." *Id*. at 1087-1088. Here, by sharp contrast, Plaintiffs does not allege ***any specific activity*** by Taylor's in California.

IV
THE COURT SHOULD DISMISS THIS CASE BECAUSE OF THE ARBITRATION CLAUSE IN THE UNDERLYING AGREEMENT

Because the Agreement involves interstate commerce, indeed, international commerce, the Federal Arbitration Act ("FAA") applies. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995). "Under the FAA, written arbitration contracts...are enforceable as a matter of federal law unless one or more of the claims at issue are non-arbitrable pursuant to federal standards." *Stuart v. Household Retail Servs., Inc.*, 2000 U.S. Dist. Lexis 22509, 8 (C.D. Cal. 2000) (citing *Moses H. Cone Mem. Hosp. v. Mercury Constr.*, 460 U.S. 1, 24-35 (1983)).

The parties' Agreement requires arbitration of all disputes. Therefore, this case does not belong in court, and should be dismissed. "An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974). A contractual forum selection clause is *prima facie* valid and should be enforced unless unreasonable under the circumstances. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972), over'd in part by 28 U.S.C. 1404(a) as recognized in *Stewart*

Organization, Inc. v. Ricoh Corp., 487 U.S. 22, 29, 108 S. Ct. 2239, 101 L. Ed. 2d 22 (1988); *see also Smith, Valentino & Smith, Inc. v. Superior Court of Los Angeles County*, 17 Cal.3d 491, 495 (1976) ("we are in accord with the modern trend which favors enforceability of such forum selection clauses") (citing *Bremen*, 407 U.S. 1). When the "choice of [ ] forum was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason, it should be honored by the parties and enforced by the courts." *Bremen*, 407 U.S. at 12; *see also Smith*, 17 Cal.3d. at 495-6.

"The Supreme Court has not spoken to the issue of which rule governs dismissal on the grounds of a forum selection clause." *Brown v. Lloyd's*, 219 B.R. 725, 729 (Bankr. D. Tex. 1997). The Tenth Circuit notes that a "motion to dismiss based on a forum selection clause frequently is analyzed as a motion to dismiss for improper venue under Fed. R. Civ. P. 12(b)(3)." *Riley v. Kingsley Underwriting Agencies, Ltd.,* 969 F.2d 953, 956 (10th Cir. 1992) (citing *Spradlin v. Lear Siegler Mgmt. Servs.*, 926 F.2d 865, 866 (9th Cir. 1991) and others). But "[l]ittle consistency exists today between the Courts of Appeal." *Brown v. Lloyd's*, 219 B.R. at 729 (citations omitted); *see also Silva v. Encyclopedia Britannica, Inc.*, 239 F.3d 385, 388 n3 (1st Cir. 2001) (noting variegated views among circuits).

Regardless of the procedural Rule that this Court applies, all require dismissing this case based on the arbitration provision.

V
THIS COURT SHOULD DISMISS THIS CASE FOR IMPROPER VENUE

Federal law provides that civil actions may be brought **only** in a judicial district: 1) where any defendant resides; 2) a substantial part of the events or omissions giving rise to the claim occurred; or 3) where any defendant may be found if there is no district in which the action may other wise be brought. 28 U.S.C. 1391(b). For purposes of venue, a corporate defendant shall be deemed to reside in any judicial district where it is subject to personal jurisdiction at the time the action is commenced. 28 U.S.C. 1391(c).

First, Taylor's is not a resident of this district, or any other district in California. It is

headquartered in and has always maintained its principal place of business in Ohio. Filos Decl., ¶ 2. As discussed in section II B above, Taylor's did not engage in any activity within California that would subject it to personal jurisdiction in this district at the time of the filing of the Complaint (or for that matter at any time prior to the filing of the Complaint).

Second, none of the "events or omission" leading to Plaintiffs' claims arose in California. To the contrary, the Agreement was negotiated and signed by Taylor's in Ohio and Welltec delivered the majority of the machines at issue to Taylor's in Ohio. Filos Decl., ¶¶ 6, 7. Taylor's issued payment for those machines from its bank in Ohio. The Southern District of California is simply not the proper venue for this action because it has absolutely no connection to this case whatsoever.

"The district court of a district in which is filed a case laying venue in the wrong division or district **shall** dismiss, or if it be in the interest of justice, transfer such case to any district or division in which **it could have been brought**." 28 U.S.C § 1406. This case "could have been brought" in the Southern District of Ohio, were defendant resides and is subject to personal jurisdiction.

VI
IN THE ALTERNATIVE, THE COURT SHOULD STAY THIS ACTION PENDING ARBITRATION

If the Court declines to dismiss or transfer this case, it should at a minimum stay the action to permit the parties to arbitrate in accordance with their Agreement. "The Federal Arbitration Act *requires* a court to stay an action whenever the parties to the action have agreed in writing to submit their claims to arbitration:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, *shall* on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement..."

Wagner v. Stratton Oakmont, Inc., 83 F.3d 1046, 1048 (9th Cir. 1996) (quoting 9 U.S.C. § 3, emphasis added).

Applying the above authorities, the Court should dismiss this case in its entirety. To allow the case to sit on the court's docket would be a waste of judicial time and resources. At a bare minimum, the Court should stay all proceedings in this case in order to preserve judicial economy and avoid unnecessary expenditures of time and money for the parties.

VII
CONCLUSION

Because Taylor's lacks the constitutionally required "minimum contacts" in California, this Court cannot exercise personal jurisdiction over it. To do so would constitute a denial of due process. Moreover, forcing Taylor's to litigate in this district would contravene the principles of proper venue. Taylor's therefore respectfully requests that the Court dismiss Plaintiffs' claims pursuant to Rule 12(b)(2) or (3) of the Federal Rules of Civil Procedure, and because parties have agreed to arbitrate the claims giving rise to this case. In the alternative, Taylor's requests that the Court transfer the matter to the Southern District of Ohio, where it should have been brought in the first instance. If the Court does not dismiss or transfer the case, Taylor's requests that the Court at least stay all further proceedings in order to permit the parties to arbitrate.

DATED: May 23, 2008

SOLOMON WARD SEIDENWURM & SMITH, LLP

By: */s/Tanya M. Schierling*
TANYA M. SCHIERLING
MICHAEL M. VASSEGHI
Attorneys for TAYLOR'S INDUSTRIAL SERVICES. LLC a/k/a HPM DIVISION

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

CALIFORNIA CASES

FEDERAL STATUTES

CALIFORNIA STATUES

OTHER AUTHORITIES